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83-1497

No.

In the Supreme Court of the United States

October Term, 1983

MARION BARROW,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

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QUESTION PRESENTED

1. Is it reasonable, under the Fourth Amendment to the Constitution of the United States, for a State Highway Patrolman to search the premises of third party, where the Highway Patrolman is allegedly in pursuit of a vehicle wanted only for a non-violent misdemeanor (speeding), and where the Highway Patrolman, having lost sight of the vehicle, was unable to identify the vehicle or so much as the number of occupants, and the gender of the driver, exigent circumstances having dissipated, without attempting to obtain judicial approval for the admitted reason that he did not possess sufficient information or facts. The Petitioner's prosecution herein resting on his failure to consent to the intrusion, along with his insistence that the officer obtain judicial approval.

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No.

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MARION BARROW,
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vs.

THE STATE OF KANSAS,
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ON PETITION FOR WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

The Petitioner, Marion Barrow, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals of the State of Kansas, entered in this proceeding on November 23, 1983, along with the Supreme Court of Kansas' denial of the Petitioner's Petition for Review on January 20, 1984.

OPINION BELOW

The Opinion of the Court of Appeals of the State of Kansas is unpublished and is appended hereto. The Order of the Supreme Court of Kansas, denying review, without Opinion, is appended hereto.

JURISDICTION

The Judgment of the Court of Appeals of the State of Kansas was rendered on November 23, 1983. A timely Petition for Review by the Supreme Court of the State of Kansas was denied on January 20, 1984, and this Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States (U.S. Const. Amend. IV) provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Kansas Statutes Annotated, Sec. 21-3808, provides:

> "Obstructing legal process or official duty is knowingly and willfully obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ, warrant, process or order of the court, or in the discharge of any official duty.
>
> "Obstructing legal process or official duty in a case of felony is a Class E felony. Obstructing legal process or official duty in a case of misdemeanor or a civil case is a Class A misdemeanor."

STATEMENT OF THE CASE

The Petitioner was convicted of obstructing official duty in violation of Kansas Statutes Annotated, Sec. 21-3808. Obstructing official duty, in this case, is a Class A misdemeanor, punishable by confinement in the County jail for a term not exceeding one (1) year, and/or a fine in a sum not to exceed $2,500.00. At the Defendant's trial, the following facts were developed:

On March 12, 1982, at approximately 10:20 p.m., Trooper Gary Thiessen of the Kansas Highway Patrol was on duty, patrolling a stretch of U.S. Highway 75, approximately one mile south of the City of Holton in Jackson County, Kansas. The officer met a vehicle, which his radar indicated was traveling at a speed of 72 m.p.h., a violation of the 55 m.p.h. speed limit in effect. The officer turned his patrol car around and proceeded to pursue the vehicle with his red lights on. The vehicle passed another vehicle and turned into a private drive at Barrow Motors. Barrow Motors is a business, located on property owned by the Petitioner. The Petitioner's home is located in another area of the same property. (R. Vol. 3, pp. 8-9)

Trooper Thiessen described the vehicle as being a small car, which appeared to be brown in color, with horizontal taillights and rectangular headlights. On cross examination, the trooper stated that he could not tell what kind of car he was chasing. He was unable to state whether the car was a two-door or a four-door model. He could not tell whether the car was being driven by a man or a woman. He could not state what state license plate was on the car, but was able to determine that the plate was white in color. He also stated that it was possible that the car was orange, rather than brown in

color. The trooper admitted that at one point he had stated that the vehicle had hexigon headlights. (R. Vol. 3, pp. 10, 41-47)

The car which Trooper Thiessen was pursuing drove around the north end of the buildings, which were on the front part of the property. The trooper followed the car around the end of the buildings and discovered that he had lost sight of it. The area behind the buildings is a salvage yard with several drives leading through it. (R. Vol. 3, p. 12)

The trooper did not enter the salvage yard, as he had become concerned that if he entered the yard in one direction, the car he was pursuing would leave it in another. The trooper returned to the entrance and radioed the Holton police for a back-up. When the local police car arrived, the trooper had one of the local officers block the entrance. The trooper and the other local officer began a search of the Petitioner's property. (R. Vol. 3, pp. 12-15)

The trooper admitted that he had no warrant authorizing this search and had not sought one. He further admitted that a warrant could not have been issued based on the description he was able to give. (R. Vol. 3, pp. 81 and 82)

While the trooper was searching the Petitioner's property, he had at least two, and possibly three, encounters with the Petitioner, who objected to his presence, asking to see his warrant. (R. Vol. 3, pp. 17-19, 23-32, 195-198) On the final encounter, the trooper's patrol car was blocked by a pickup truck driven by a friend of the Petitioner. The Petitioner and the trooper exchanged words. During this exchange, the Petitioner was carrying an unloaded shotgun on his shoulder. The trooper ar-

rested the Petitioner during this exchange. (R. Vol. 3, pp. 23-32) The speeder for whose arrest the entry was ostensibly made was never found nor arrested. During the course of the trooper's search, which covered the entire salvage yard, the trooper never saw any car which even "tickled his suspicion". (R. Vol. 3, pp. 23, 75-90)

The Petitioner was charged by Information with aggravated assault on a law enforcement officer, and obstructing an official duty. (R. Vol. 3, p. 3) The charge of aggravated assault on a law enforcement officer was disposed of when the Trial Court sustained the Petitioner's Motion for Judgment of Acquittal at the end of all of the evidence. (R. Vol. 3, p. 317) The Petitioner was convicted by a jury of the offense of obstructing an official duty. (R. Vol. 3, p. 330) The Petitioner's post-trial Motion for Judgment of Acquittal, or in the Alternative, for a New Trial, was overruled. (R. Vol. 1, pp. 21-23) The Petitioner's timely appeal to the Kansas Court of Appeals was unsuccessful and the Kansas Supreme Court refused his Petition for Review.

Throughout the proceedings, the Petitioner has maintained that Trooper Thiessen's activities in searching his property were unlawful, because the search violated the Defendant's rights under the Fourth Amendment to the Constitution of the United States, in that the officer was not in possession of a valid Search Warrant, nor was his search authorized by any of the recognized exceptions to the warrant requirement. The trooper's entry on his property was clearly unlawful. The issue that the Petitioner seeks this Honorable Court to review, the unlawfulness of the officer's search of his premises, was raised through Motions before the Trial Court, the Kansas Court of Appeals and the Kansas Supreme Court, which is reflected in the Opinion of the Kansas Court of Appeals. (A. A2-A4)

REASONS FOR GRANTING THE WRIT

The Opinion rendered by the Kansas Court of Appeals, in which the Kansas Supreme Court denied review, is in conflict with the teachings of this Court, the Federal Circuit Courts, and further serves to repudiate previous decisions of the Kansas Supreme Court. The Court's Opinion carves yet another exception to the Fourth Amendment to the United States Constitution, contrary to existing precedents and totally beyond the realm of constitutional reasonableness in that the Court has applied the "hot pursuit" exception in an arbitrary fashion, without regard for the circumstances that existed at the time of the warrantless entry into a third party's premises, the Petitioner's, for a non-violent misdemeanor, speeding.

In examining the decisions of this Court dealing with "hot pursuit", it is clearly evident that "hot pursuit" in and of itself is not an exception to the warrant requirement of the Fourth Amendment, but it is merely an application of the doctrine of exigent circumstances, which in certain situations may excuse the failure to comply with the warrant requirement, this Court additionally restricting the exception's application to felony crimes. *Coolidge v. New Hampshire*, 403 U.S. 443, 480 (1971); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970).

The first case in which the words "hot pursuit" were used was the case of *Johnson v. United States*, 333 U.S. 10 (1948). In that case, government agents entered Johnson's hotel room without a warrant, based upon the smell of opium emanating from the room. The government attempted to justify the warrantless arrest and search on the basis of "hot pursuit". In a footnote to the decision, the Court stated:

> "However, we find no element of 'hot pursuit' in the arrest of one who was not in flight, was completely surrounded by agents before she knew of their presence, who claims without denial that she was in bed at the time, and who made no attempt to escape."

The Court did indicate that in a case where exceptional circumstances existed in which, on balancing the need for effective law enforcement against the right of privacy, it could be contended that a Search Warrant might be dispensed with. The Court indicated that the pursuit of a fleeing suspect might be such a circumstance.

In the case of *Warden v. Hayden*, 383 U.S. 249 (1967), which is usually identified as establishing the "hot pursuit" exception, the Court upheld a warrantless entry and search under the following circumstances: Two cab drivers followed an armed robber to a house. They described the man as a Negro about five feet, eight inches tall, wearing a light cap and dark jacket, and pointed out to the police the house which he had entered. The police arrived within five minutes and entered the house, searching for the suspect. In upholding that search, this Court stated:

> "We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant, was invalid. Under the circumstances of this case, 'the exigencies of the situation made that course imperative'. *McDonald v. United States*, 335 U.S. 451, 456. The police were informed that an armed robbery had taken place and that the suspect had entered at 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the descrip-

tion they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would greatly endanger their lives, the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and the police had control of all weapons which could be used against them or to effect an escape."

In the *Hayden* case, the police were not actually in "hot pursuit" of Hayden. The Court decided the case on the exigent circumstances which existed. The police were aware that an armed robber of whom they had an excellent description had entered the house. Any delay might have allowed his escape or endangered the lives of the police or other citizens.

The final "hot pursuit" case is *United States v. Santana*, 427 U.S. 38 (1976). This case is the only true "hot pursuit" case ever decided by this Court. In *Santana*, police officers, with probable cause, attempted to arrest Santana who was standing in the doorway of her house. When she saw the police, she retreated in the house. The police followed and caught her in the vestibule. This Court held that the police had been justified in arresting Santana at the vestibule at her home without a warrant because it was a public place. The Court then held that the police were justified in pursuing a suspect into a private place in order to effect an arrest which had been set in motion in a public place. Additionally, the Court held that there was a reasonable expectation that evidence would be destroyed because Santana had seen the officers.

Thus, it is obvious that the so-called "hot pursuit" exception to the Fourth Amendment is in actuality a part of the exigent circumstances exception. The exigent circumstances doctrine allows a search to proceed without a warrant when "the exigencies of the situation make that course imperative." *McDonald v. United States*, 335 U.S. 451 (1948).

The Kansas Court of Appeals has treated this case as if the "hot pursuit" exception were a definite exception to the warrant requirement, such as the "incident to a lawful arrest", or the "consent" exception. The Kansas Court of Appeals took the position in this case that a pursuit had taken place, and, therefore, a search in connection with that pursuit was reasonable and required no warrant. This is the same type of result which would be reached in an arrest case. A lawful arrest takes place; therefore, a search in conjunction with that arrest is reasonable and requires no warrant. Such a cut and dried formula is reasonable in the case of an arrest because of the possibility of assault on the officer or destruction of evidence which accompany any arrest. *Chimel v. California*, 395 U.S. 752 (1969).

The exigent circumstances exception to the warrant requirement is not as cut and dried. This exception recognizes that in certain cases warrantless arrests and searches are not unreasonable because the requirements of obtaining a warrant would defeat the ends of justice, either by allowing the escape of a criminal, the destruction of vital evidence or exposing the public to great danger. *McDonald v. United States*, supra; *Johnson v. United States*, supra; *Warden v. Hayden*, supra; *United States v. Santana*, supra. These types of circumstance must, by their very nature, be determined on a case by case basis. Each case requires a balancing between the

right to privacy and the need for effective law enforcement. *Johnson v. United States,* supra. In any case of warrantless search and seizure, the burden is on the one claiming exception to prove that it was necessary. *Coolidge v. New Hampshire,* supra. In the case of *Dorman v. United States,* 435 F.2d 385 (C.A. D.C. Cir. 1970), the Court of Appeals for the District of Columbia established a six-part test for determining exigent circumstances or urgent needs in cases involving warrantless entries to effect arrest. This test has been adopted by other jurisdictions, including the Second Circuit, *United States v. Reed,* 572 F.2d 412 (2nd Cir. 1978), and the State of Kansas, *State of Kansas v. Platten,* 225 Kan. 764, 594 P.2d 201 (1979). The six factors are: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) strong reasons to believe that the suspect is in the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry. These factors have never been held to be exclusive for determining warrantless entry.

In making this analysis in this case, there can be no question that the public interest does not outweigh the Appellant's rights in this case. This conclusion is readily apparent when the six factors from the *Platten* case are utilized. First, the offense for which the trooper sought to make an arrest was not a violent offense, nor was it a serious offense, speeding. In this case, had the automobile the trooper was pursuing stopped and the trooper issued a citation, the driver could have posted and forfeited a $40.00 bond, and no other action would have been taken. The offense of speeding is probably as minor an offense as can be found in the State statute. Second, there was never any indication that the driver

of the vehicle was armed or posed any actual danger to the public at large. Third, there was actually no clear showing of probable cause in this case, although it is clear that the officer observed the automobile exceeding the speed limit and that thus a crime had been committed in his presence. At the time the officer entered the Appellant's property, he could not have legitimately made any arrests. This is because the officer in fact had no suspect. The officer had not seen the person who was allegedly driving the car, and could not in any way describe him. The officer's description of the car was so vague that once he had lost sight of that automobile, he would not have been able to positively identify any automobile as the one he was pursuing, much less make an identification of a driver for the purposes of an arrest or prosecution for speeding. Probable cause in this case was actually non-existent. Fourth, strong reasons to believe that the suspect is in the premises. The officer had seen the auto he was pursuing enter the Barrow premises. He obviously felt that there was only one way out of the Barrow property, and that was back onto Highway 75. Thus, the officer did, in fact, have strong reason to believe that the suspect was in fact on the premises. Fifth, the likelihood that the suspect would escape. This factor is actually almost the entire rationale behind the "hot pursuit" exception, the idea being that "hot pursuit" prevents the escape of criminals. However, in this case, there is some difference. The officer had closed off the means of escape, the Court of Appeals finding that exigent circumstances had been dissipated. Hence, there was actually no likelihood that the "phantom suspect" would have escaped while the officer sought out a warrant; however, judicial approval he neither attempted nor sought, as admittedly his sparse information could never be equated to allow for a finding of probable

cause. Having secured the property against the possibility of escape, exigent circumstances having been found dissipated, then is it not the officer's duty to seek out judicial approval?

The officer did not enter the Defendant's property to make an arrest. His entry was done in order to attempt to develop a suspect. His search was purely exploratory. The burden that the Courts have placed upon the use of any exception to the Fourth Amendment has always rested with the prosecution, and has never been reduced to allow its use as was done here "when viewed in the light most favorable to the prosecution, the evidence was sufficient to establish the patrolman was lawfully on the Defendant's premises and duly engaged in the performance of his official duty." (A. A2-A4) *Vale v. Louisiana*, supra. The Petitioner's prosecution herein is clearly the result of his repeated failure to consent to the officer's unlawful intrusion into his premises, along with the attempt to enforce, limitedly, his substantive rights. The Petitioner's plight happened, admittedly, absent probable cause, exigent circumstances, consent or the existence of an Arrest or Search Warrant, clearly in violation of his substantive rights, which was noted by the Kansas Court of Appeals, which clearly renders the officer's entry herein unlawful. *Steagald v. United States*, 451 U.S. 204, 221 (1981).

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal

construction deprives them of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon." *Boyd v. U.S.*, 116 U.S. 616, 635 (1886); *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

In addition, the Kansas Court of Appeals' finding that the officer's entry as being lawful on the pretext of K.S.A. 1982 Supp. 22-2401a(6)(c) is unique in that the Petitioner was arrested on March 12, 1982, and the statute was not enacted until July 1, 1982. However, if the statute is to expand existing constitutional requirements, it must adhere to constitutional prescriptions. *Ker v. California*, 374 U.S. 23, 34 (1963). The Court's reasoning that the Defendant's failure to capitulate hindered or opposed the officer's anxieties sufficed to affirm his conviction of a violation of K.S.A. 21-3808, Obstruction, clearly bespeaks the seeds of anarchy, in that his resistence finds constitutional sanctions estopping waiver or consent. *Thompson v. Louisville*, 362 U.S. 199, 205 (1960); *Rochin v. California*, 342 U.S. 165 (1952); *People v. Swirecz*, 432 N.E.2d 900 (Ill. 1982); *People v. Young*, 242 N.E.2d 587 (Ill. 1968).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment of the Kansas Supreme Court, along with the Judgment and Opinion of the Kansas Court of Appeals.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 83-55261-A

State of Kansas, Appellee,

v.

Marion Barrow, Appellant.

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.
DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date January 20, 1984

NOT DESIGNATED FOR PUBLICATION

No. 55,261

IN THE
COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MARION BARROW,
Appellant.

MEMORANDUM OPINION

Appeal from Jackson District Court; TRACY D. KLINGINSMITH, judge. Opinion filed November 23, 1983. Affirmed.

John C. Humpage of Humpage, Berger and Hoffman, of Topeka, for the appellant.

Frank A. Caro, Jr., legal intern, *J. Richard Lake*, county attorney, and *Robert T. Stephan*, attorney general, for the appellee.

Before FOTH, C.J., SPENCER and PARKS, JJ.

PER CURIAM: This is a direct appeal from jury conviction of obstructing official duty, K.S.A. 21-3808.

Defendant asserts error in the denial of his motion for acquittal, contending the highway patrolman was not engaged in the performance of official duty; that the warrantless search of defendant's property was unreasonable and a violation of the Fourth Amendment to the

Constitution of the United States; and that any acts committed by defendant were privileged under the law.

A law enforcement officer may arrest a person without a warrant when any crime, including a speeding violation, has been or is being committed by such person in the officer's view. As defined by K.S.A. 1982 Supp. 22-2401a(6)(c), "fresh pursuit" means pursuit, without unnecessary delay, of a person who has committed a crime, or who is reasonably suspected of having committed a crime. "Fresh pursuit," or "hot pursuit" as it is commonly referred to, has been recognized as one of the basic exceptions to the requirement for a search warrant. *State v. Sanders*, 5 Kan.App.2d 189, 195, 614 P.2d 998 (1980). The record in this case reveals it to be one which falls within the "hot" or "fresh" pursuit exception. The patrolman had chased the speeder from the public highway onto defendant's property. Although he lost sight of the vehicle, he was reasonably certain the vehicle was still on the premises. The short delay in obtaining a backup unit before commencing the search was not unreasonable in light of the possibility of escape. When viewed in the light most favorable to the prosecution, the evidence was sufficient to establish that the patrolman was lawfully on defendant's premises and duly engaged in the performance of official duty. See *State v. Williams*, 229 Kan. 290, 623 P.2d 1334, *reh. denied* 229 Kan. 646, 630 P.2d 694 (1981). See also *United States v. Santana*, 427 U.S. 38, 49 L.Ed.2d 300, 96 S.Ct. 2406 (1976); *Monroe v. Darr*, 221 Kan. 281, 559 P.2d 322 (1977); 68 Am.Jur.2d, Searches and Seizures § 56.

Defendant also argues his actions were privileged under the law. Reliance is placed in part on K.S.A. 21-3212 and 3213. These statutes authorize an individual to use reasonable force or threats to prevent or terminate

an "unlawful" interference with his or her dwelling or other property. Since the officer's entry onto defendant's property was lawful, defendant was not privileged to use threats or force which would obstruct the officer in the performance of his duty. The record reveals defendant twice ordered the patrolman off his property, using profanities. The second time, defendant was carrying a shotgun on his shoulder and walked directly toward the officer. Defendant's pickup was used to stop the patrol car and the officer's continued search of the premises. Although defendant did not drive the pickup, its use was at his suggestion and with his consent. In light of all the evidence, the jury could reasonably find defendant had willfully obstructed the officer's performance of an official duty.

Defendant asserts error in the giving of instruction No. 4. That instruction is an accurate statement of the law and, when considered with the other instructions given, we find the jury was adequately informed on the issues of this case.

Having reviewed the record on appeal and considered the issues presented by defendant, we find no reversible error.

Affirmed.

KANSAS STATUTES

K.S.A. 1982 Supp. 22-2401a(6)(c):

"fresh pursuit" means pursuit, without unnecessary delay, of a person who has committed a crime, or who is reasonably suspected of having committed a crime.

HISTORY: L. 1977, Ch. 82, Sec. 1; L. 1977, Ch. 84, Sec. 1; L. 1982, Ch. 380, Sec. 2; July 1.

K.S.A. 21-3212:

Use of force in defense of dwelling. A person is justified in the use of force against another when and to the extent that it appears to him and he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon his dwelling.

K.S.A. 21-3213:

Use of force in defense of property other than a dwelling. A person who is lawfully in possession of property other than a dwelling is justified in the threat or use of force against another for the purpose of preventing or terminating an unlawful interference with such property. Only such degree of force or threat thereof as a reasonable man would deem necessary to prevent or terminate the interference may intentionally be used.

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